

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of the Application of)	
)	
WIRELESS TELCO)	FCC File Nos. 9510601 and 9510607
)	
Request for Reinstatement <i>Nunc Pro Tunc</i> and/or)	
Stay of Processing Action)	

ORDER

Adopted: April 7, 2000

Released: April 10, 2000

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. This *Order* addresses two requests filed by Wireless Telco¹ to reinstate *nunc pro tunc* the above-captioned applications or, in the alternative, stay the dismissal² of the applications. For the reasons set forth below, we deny the request.

II. BACKGROUND

2. *New Haven, Connecticut Application.* On June 13, 1995, Commco, L.L.C. (Commco) was granted authorization to operate a point-to-point microwave station on the 38.6-40.0 GHz (39 GHz) band in the New Haven, Connecticut area.³ On September 29, 1995, Wireless Telco filed an application for authorization to operate a point-to-point microwave station in the 39 GHz band in New Haven, Connecticut.⁴ Wireless Telco's New Haven application sought authorization to operate on facilities that geographically overlapped the service area authorized to Commco.

3. *Indianapolis, Indiana Application.* On September 20, 1995, we placed a DCT

¹Letter from Walter H. Sonnenfeldt, counsel for Wireless Telco, to Mary M. Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division (filed Oct. 1, 1999) (New Haven Request); Letter from Walter H. Sonnenfeldt, counsel for Wireless Telco, to Mary M. Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division (filed Feb. 4, 2000) (Indianapolis Request).

²Letter from Mary M. Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division to Wireless Telco regarding FCC File No. 9510601 (Aug. 31, 1999) (New Haven Dismissal Letter); Letter from Mary M. Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division to Wireless Telco regarding FCC File No. 9510607 (Dec. 21, 1999) (Indianapolis Dismissal Letter).

³*Public Notice*, Report No. 1142 (rel. Jul. 5, 1995).

⁴FCC File No. 9510601.

Transmission, L.L.C. (DCT) 39 GHz application seeking authorization to operate a point-to-point microwave station in the Indianapolis, Indiana area on public notice.⁵ On September 29, 1995, Wireless Telco filed a 39 GHz application to operate a point-to-point microwave station in the area of Indianapolis.⁶ The Wireless Telco Indianapolis application was mutually exclusive with the application filed by DCT.

4. On December 15, 1995, the Commission suspended the processing of pending mutually exclusive 39 GHz applications and the filing of amendments thereto, pending the outcome of a rulemaking proceeding affecting this service.⁷ In a *Report and Order and Second NPRM*, released on November 3, 1997, the Commission stated that it would 1) “dismiss without prejudice all pending mutually exclusive applications, unless the mutual exclusivity was resolved by an amendment of right filed before December 15, 1995,” and 2) “dismiss without prejudice all applications that had not been placed on public notice or completed the 60-day cut-off period as of November 13, 1995.”⁸ On July 29, 1999, the Commission affirmed its license processing rules in a *Memorandum Opinion and Order* and reiterated that it would “dismiss all amendments, filed on or after December 15, 1995, including those intended to resolve mutual exclusivity among pending 39 GHz applications.”⁹ The Commission further decided to dismiss as unripe “those applications for which the 30-day public notice period was not completed by the November 13, 1995 *Freeze Order*” date.¹⁰

5. On August 31, 1999, the Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch (Branch) dismissed Wireless Telco’s New Haven application.¹¹ The Wireless Telco New Haven application was requested service area that was already authorized to Comco’s Station WMW470. Section 1.934(e)(2) of the Commission’s rules provides that an application will be dismissed if the spectrum is unavailable because it was previously assigned to another licensee on an exclusive basis.¹² On December 21, 1999, the Branch dismissed Wireless Telco’s Indianapolis application because it was mutually exclusive with DCT’s application and the mutual exclusivity was not resolved as of December 15, 1995.¹³

⁵FCC File No. 9509658. *Public Notice*, Report No. 1153 (rel. Sept. 20, 1995).

⁶FCC File No. 9510607.

⁷Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Notice of Proposed Rule Making and Order*, ET Docket No. 95-183, 11 FCC Rcd 4930, 4988-4989 ¶ 123 (1995) (*NPRM and Order*).

⁸See Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, ET Docket No. 95-183, 12 FCC Rcd 18600, 18605 ¶ 3 (1997) (*Report and Order and Second NPRM*).

⁹Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, ET Docket No. 95-183, 14 FCC Rcd 12428, 12440-12448 ¶ 37 (1999) (*July 29 MO&O*).

¹⁰*Id.* at 12450-12452 ¶ 44.

¹¹See New Haven Dismissal Letter at 1.

¹²47 C.F.R. § 1.934(e)(2).

¹³See Indianapolis Dismissal Letter at 1.

III. DISCUSSION

6. Wireless Telco's requests make similar arguments, so we shall address them collectively. Wireless Telco notes that it has filed an appeal seeking judicial review of the Commission's 39 GHz orders.¹⁴ Wireless Telco states that one of the issues in that case is the Commission's treatment regarding the "the rights of applicants to resolve mutual exclusivity conflicts that existed after December 15, 1995."¹⁵ Wireless Telco argues that, given the pendency of an appeal raising issues determinative to the resolution of his application, the application should be reinstated or, in the alternative, the dismissal should be stayed.¹⁶ Wireless Telco contends that granting the requested relief would serve the public interest, convenience and necessity by "eliminating the need for additional duplicative litigation" and helping to "remove uncertainties as to the availability of the subject frequency assignments with respect to the contemplated competitive bidding process."¹⁷

7. To receive a stay of an administrative action, a party must show that: 1) it will suffer irreparable harm if the stay is not granted, 2) it is likely to prevail on the merits of its appeal, 3) the grant of a stay will not harm other interested parties, and 4) the grant would serve the public interest.¹⁸ As the Wireless Telecommunications Bureau (Bureau) explained in a recent *Order* denying a motion for stay of dismissals in the 39 GHz band, a vague assertion of irreparable harm is insufficient to justify injunctive relief, as it fails to demonstrate an injury that is "certain and great. . . not theoretical."¹⁹ We are not persuaded that the types of injuries Wireless Telco mentions are sufficient to warrant a stay. Anticipated economic loss "does not, in and of itself, constitute irreparable harm."²⁰ Likewise, Wireless Telco has not demonstrated that the purported harm is irreparable. In this connection, we note that if it was to prevail in its judicial appeal of the Commission's order regarding the dismissal of the subject application, we anticipate that such relief would address the ultimate disposition of the application.²¹ Therefore, we find that Wireless Telco has not shown any injury warranting a stay.²²

8. In addition, we find Wireless Telco's alternate request that we reinstate its applications

¹⁴See *Bachow Communications, Inc. v. FCC*, Case No. 99-1346 (consolidating Case Nos. 99-1361 and 99-1362) (D.C. Cir. 1999).

¹⁵New Haven Request at 2; Indianapolis Request at 2.

¹⁶*Id.*

¹⁷*Id.*

¹⁸See *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 291 (D.C. Cir. 1958) (*Virginia Petroleum*), as revised by *Washington Metropolitan Area Transit System v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

¹⁹Amendment of the Commission's Rules Regarding the 37.0–38.6 GHz and 38.6–40.0 GHz Bands, *Order*, ET Docket No. 95-183, RM-8553, DA 99-2632, ¶ 2 (WTB rel. Nov. 23, 1999) (citation omitted).

²⁰*Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (*Wisconsin Gas*); see also *Virginia Petroleum*, 259 F.2d at 925 ("mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough").

²¹See 47 U.S.C. § 402(h).

²²Where, as here, petitioner fails to show that it will suffer irreparable harm in the absence of injunctive relief, we need not consider the other requirements for a stay. *Wisconsin Gas*, 758 F.2d at 674.

until its judicial appeal is resolved effectively to be a restatement of his request for a stay, so we deny that request, as well. Moreover, reinstating Wireless Telco's applications would frustrate the goals underlying this proceeding and "could lead to results inconsistent with our intent . . . to update the regulatory structure of the 39 GHz band in light of contemporary market conditions."²³ Further, we believe that the Bureau addressed this matter in its November 23, 1999, decision.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that, pursuant to Sections 154(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 1.41 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.106, the Request for Reinstatement *Nunc Pro Tunc* and/or Stay of Processing Action for File Number 9510601 filed on October 1, 1999, by Wireless Telco IS DENIED.

10. IT IS FURTHER ORDERED that pursuant to Sections 154(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 1.41 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.106, the Request for Reinstatement *Nunc Pro Tunc* and/or Stay of Processing Action for File Number 9510607 filed on February 4, 2000 by Wireless Telco IS DENIED.

11. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau

²³ July 29 MO&O, 14 FCC Rcd at 12437-38; *Report and Order and Second NPRM*, 12 FCC Rcd at 2917 ¶ 15; *NPRM and Order*, 11 FCC Rcd at 4988-89 ¶¶ 121-124.